BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	

OPPOSITION TO VERIZON PETITION FOR STAY

Pursuant to 47 C.F.R. §1.45(d), XO Communications, Inc. ("XO") responds to the Verizon telephone companies' ("Verizon") "Petition for Stay Pending Judicial Review" ("Petition"), filed on February 25, 2005 in the above-captioned matter, in which Verizon asks the Commission to "preserve the status quo" by staying those portions of the Commission's *Triennial Review Remand Order* ("*TRRO*")[1] that permit CLECs to convert special access circuits to unbundled network elements ("UNEs").

Verizon's Petition should be rejected because: (1) Verizon's request to "preserve the status quo" is inconsistent with its request to stay those portions of the *TRRO* that permit conversions, thereby rendering the Petition defective; (2) the Petition fails to establish the requirements for a stay; and (3) Verizon has "unclean hands."

INTRODUCTION

As evidenced by the glaring inconsistency in its Petition, Verizon is under the mistaken belief that federal law prohibits CLECs from converting their special access circuits to UNEs. However, it is well settled that CLECs have been entitled to such conversions at least since the

[1] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("*TRRO*").

Commission issued it its *Supplemental Order Clarification* on June 2, 2000.[2] As such, the grant of relief that Verizon should have requested is a *reversal* of the status quo. Verizon, however, apparently believes the law is what Verizon says it is. That position is illustrated not only by the inconsistency in Verizon's Petition, but also by Verizon's ongoing refusal to allow CLECs to amend their interconnection agreements to provide for special access to UNE conversions. Indeed, Verizon's defective Petition effectively asks the Commission to rescue it from its previous non-compliance with prior Commission directives. In so doing, Verizon has attempted to mislead the Commission by intentionally misstating the legal standard for determining whether to grant a stay.

It is clear that a stay is ***inappropriate*** where significant "harm will befall other interested persons or the public" or where denial of the order would not "inflict irreparable injury on the movant."[3] Yet Verizon has re-written the applicable standard to require only a "balanc[ing] of the equities."[4] Verizon's re-written standard is incorrect as a legal matter, yet it is clear why Verizon must try to mislead the Commission. It is because Verizon cannot satisfy the truly applicable standard for a stay. Both CLECs and the public would suffer severe harm if unable to convert special access circuits to UNEs, whereas the harm incurred by Verizon in charging UNE pricing during judicial review would be minor.

CLECs made clear in the *TRRO* proceeding that special access pricing is not an adequate substitute for UNEs. CLECs showed that special access pricing is grossly above cost and worsening. CLECs also demonstrated that in most areas, special access pricing is too high to

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[2] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98 (rel. June 2, 2002) ("*Supplemental Order Clarification*").

[3] *See, Washington Metro. Area Transit Comm'n v. Holidays Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) ("*Washington Metro*").

[4] *Id.*

overcome their "impairment" and sustain competitive entry. They also made clear that in many cases they ordered special access because ILECs refused to provision UNEs, and CLECs decided to absorb the loss temporarily until they could convert them to UNEs.[5] Indeed, the Commission correctly found that a rule barring access to UNEs based on the availability of special access creates an unacceptable risk of significant abuse -- *i.e.,* "price squeeze" -- by ILECs.[6] The Commission went on to find that permitting conversions was very important, since CLECs demonstrated that they were forced to accept special access pricing temporarily to get into service, but depended on converting to UNE pricing as soon as possible thereafter.[7]

Verizon's Petition is inherently defective and fails to establish any of the requirements for a stay. Additionally, Verizon comes to the Commission "unclean hands." Accordingly, Verizon's Petition should be denied.

DISCUSSION

I. VERIZON'S PETITION WOULD REVERSE THE STATUS QUO, NOT PRESERVE IT

In its *Supplemental Order*, the Commission held that carriers may convert special access circuits to UNE combinations if they provide a "significant amount of local exchange service."[8] The Commission later clarified what constitutes a "significant amount of local exchange service"

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[5] *See TRRO* at ¶64; *See also*, FNs 175 -185, including FN 182 (letter from Brad E. Mutschelknaus, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 3-5 (filed Dec. 7, 2004) and Loop and Transport Coalition Comments at 56-59 (stating that ILECs have been intransigent in permitting CLECs to order combinations as UNEs, have hampered efforts to order UNEs for commingled services, have been dilatory in converting special access facilities to UNEs, and have imposed excessive)), FN 184 (Loop and Transport Coalition Comments at 48-50 (stating that XO uses special access while it contests conversion charges that would make EELs as costly as special access)), and FN 185 (XO Dec. 7, 2004 letter at 1-2, and Loop and Transport Comments at 57 (citing the need temporarily to order special access to ensure that CLECs don't lose customers while waiting for Verizon to provision UNEs)).

[6] *Id.* at ¶¶ 59-63.

[7] *Id.* at ¶ 231; FN 648 and 649.

[8] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98 (rel. Nov. 24, 1999) ("*Supplemental Order*") at ¶ 2.

in its *Supplemental Order Clarification* by setting out three "safe harbors" under which a carrier would be presumed to be providing a "significant amount of local exchange service" and thus entitled to convert its special access circuits to UNEs.[9] In the *Triennial Review Order* ("*TRO*"), the Commission replaced its safe harbors with certain eligibility criteria, which if met, permit carriers to convert ILEC tariffed offerings to UNEs.[10] Critically, that portion of the *TRO* was upheld on appeal by the D.C. Circuit in *USTA II*.[11] Moreover, the *TRRO* did nothing to disturb the FCC's finding in the *TRO* that CLECs may convert special access circuits to UNEs. To the contrary, the Commission stated, "[g]iven our conclusion [] that a carrier's current use of special access does not demonstrate a lack of impairment, we conclude that a bar on conversions would be inappropriate."[12]

Thus, it is well settled that federal law permits CLECs to convert special access circuits to UNEs under certain circumstances. Accordingly, Verizon's request to stay the Commission's finding regarding conversions *ipso facto* would *reverse* the status quo rather than preserve it. Verizon's request to *preserve* the status quo is inconsistent with its stay request, thereby rendering Verizon's Petition defective. In light of the foregoing, the Commission must deny Verizon's Petition.

II. VERIZON'S PETITION DOES NOT MEET THE LEGAL STANDARD FOR A STAY

Verizon attempts to confuse the issue by intentionally misstating the standard for granting a stay. According to Verizon, "the challenged aspect of the [*TRRO*] should be stayed if

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[9] *Supplemental Order Clarification* at ¶ 21.

[10] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*") at ¶ ¶ 585-589.

[11] *United States Telecom Ass'n v. FCC*, 359 F.3d554, 592-93 (D.C. Cir. 2004) ("*USTA II*"). Notably, the Court only remanded to the Commission consideration of any "potential anomaly" that might be created if the FCC were to find on remand that CLECs currently using special access are not impaired without access to UNEs.

[12] *TRRO* at ¶ 229.

petitioners demonstrate *either* (1) a likelihood of success on the merits together with a showing of "irreparable injury," *or* (2) a "serious" question regarding the merits coupled with a "substantial" showing that the balance of equities tips in petitioners' favor."[13] However, as the Commission itself has noted, there is a four-prong test to be applied when determining whether a stay is warranted: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[14] As discussed in more detail below, Verizon's Petition should be denied when evaluated under the correct standard.

A. Verizon Is Unlikely to Prevail on the Merits

There is no new or novel legal theory involved here. The FCC determined in the *TRO* that CLECs may convert tariffed ILEC services to UNEs.[15] That portion of the *TRO* was upheld on appeal by the DC Circuit.[16] While the Court remanded the impairment determination to the Commission, it did not upset the Commission's prior determination that CLECs are entitled to convert special access circuits to UNEs wherever it ultimately determined that impairment exists. The right to convert ILEC tariffed offerings is a matter of settled law at this point and thus Verizon is unlikely to prevail on the merits.

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[13] Verizon Petition at p. 2, *citing Washington Metro, supra,* at 844.

[14] *See e.g., Paxson Communications Corp. v. DIRECTV, Inc. Motion for Stay,* Memorandum Opinion and Order, 17 FCC Rcd 10944 (rel. June 10, 2002), *citing Virginia Petroleum Jobbers Ass'n v. Federal Power Commission,* 259 F.2d. 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum*"), *as modified by Washington Metro, supra,* at 843.

[15] *TRO, supra,* at ¶ ¶ 585-589

[16] *USTA II, supra,* at 592-593; *See TRRO* at ¶ 229.

B. Complying With the Conversion Rule During Appeal Will Not Inflict Irreparable Injury on Verizon

As an initial matter, it must be realized that the impact on Verizon will be relatively small. Since the FCC shielded the lion's share of special access circuits from conversion by requiring that wireless and long distance carriers may not order UNEs, the FCC already has found that the impact is likely to be minimal.[17] Indeed, Verizon confesses as much by stating that their estimated revenue loss for 2005 would be "tens of millions of dollars," which is a relatively paltry sum when compared to Verizon's approximately $71 billion annual revenue stream.[18]

Even this minor potential injury is entirely "reparable" if, as is unlikely, Verizon succeeds on appeal in reversing the FCC determination and the prior decision of the Court in *USTA II.* Specifically, it is important to realize that Verizon recovers the full TELRIC cost of its network in its UNE rates, and is similarly entitled to impose a TELRIC based charge for UNE conversions and network grooming. Thus, all that is at issue is the non-cost based "extra profit" premium built into special access rates. Nevertheless, should Verizon prevail on appeal, it could be made whole by simply engaging in a retroactive "true-up" of the difference between the cost based UNE rates and the non cost based special access rates. Verizon's claim that it will not be able to bill carriers that go bankrupt simply cannot be taken seriously, since they point to no evidence that any such bankruptcies are imminent, or attempt to quantify the problem. Indeed, the claim is impeached by Verizon's own statement in its pleading that "CLECs are successfully

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[17] *TRRO,* supra, at ¶ 230.

[18] Verizon Petition, Lataille Declaration, at ¶ 10.

competing using special access services,"[19] and that "CLECs will be able to compete successfully in the market, just as they are doing today."[20]

Verizon's claim of irreparable injury due to the need to arbitrate UNE amendments before state commissions is similarly inconsequential.[21] First, Verizon could avoid the problem entirely by simply agreeing to amend interconnection agreements to permit conversions as the FCC requires. Arbitration is only required where Verizon refuses to implement *existing law* in interconnection agreements -- as has been its practice. Second, such arbitration costs are a routine cost of doing business, as contemplated by Congress and incorporated into Section 252 of the Act. It is notable that the expense of state commission proceedings did not prevent Verizon from filing complaints against CLECs nationwide last year seeking to impose upon them its strained interpretation of the *TRO*.

C. Granting Verizon's Stay Request Will Inflict Enormous Harm on CLECs and the Public

CLECs demonstrated throughout the *TRO* and *TRRO* proceedings that ILEC special access offerings are grossly overpriced and do not overcome impairment.[22] CLECs also showed that ILECs effectively forced CLECs to order special access to enter markets, but that CLEC business plans are dependent on the ability to convert special access circuits to UNEs wherever they are impaired.[23] Indeed, the FCC specifically found that forced reliance on special access

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[19] Verizon Petition at 9-10.

[20] Verizon Petition at 11.

[21] Verizon Petition at 10-11.

[22] *See, e.g., TRRO* at ¶¶64-65.

[23] *See TRRO* at ¶64, including FNs 184 (Loop and Transport Coalition Comments at 48-50, stating that XO uses special access while it contests conversion charges that would make EELs as costly as special access) and FN 185 (XO Dec. 7, 2004 letter at 1-2, and Loop and Transport Comments at 57, citing the need temporarily to order special access to ensure that CLECs don't lose customers while waiting for Verizon to provision UNEs).

would subject CLECs to anticompetitive price squeezes.[24] Unless CLECs are permitted to convert special access circuits to UNEs, they will be foreclosed from expanding and could be required to discontinue service in markets where they are impaired. The harm would be suffered both by CLECs and the public that they serve. The enormous injury to competitive carriers far outweighs the minor potential that Verizon may not recover excess monopoly profits.

III. VERIZON'S PETITION SHOULD BE DENIED BECAUSE VERIZON HAS "UNCLEAN HANDS"

Under the doctrine of "unclean hands," a court or other judicial body may deny relief to a party whose conduct has been inequitable and unfair when that conduct pertains to the controversy at issue.[25] What is at issue here is a requirement imposed by the *TRO*, and upheld by the D.C. Circuit in *USTA II*, that Verizon has refused to implement. To the extent that Verizon faces any harm, it is due to its own refusal to enter *TRO* amendments relating to conversions and creation of a fictitious "no facilities" claim that precluded CLECs from ordering UNEs as they were legally entitled to do. Verizon now has the temerity to ask the Commission to rescue it from its own non-compliance with prior Commission directives.

Where a suit in equity concerns the public interest, as is the case here, the doctrine of unclean hands is of greater significance.[26] Indeed, the U.S. Supreme Court has held that if a judicial body "uses the maxim to withhold its assistance in such a case, it not only prevents a

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[24] *Id.* at FN 178 (stating that XO would no longer be able to compete for DS1- and DS3-based services if required to convert its UNEs to special access).

[25] *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) ("*Precision Instrument*"); *See, Nice Ball Bearing Co. v. Bearing Jobbers, Inc.*, 205 F.2d 841, 850-51 (7th Cir.), cert. denied, 346 U.S. 911, 74 S.Ct. 242, 98 L.Ed. 408 (1953). *See also, Consolidated Aluminum Corp. v. Foseco Int'l Ltd.*, 910 F.2d 804, 812 (Fed. Cir. 1990) ("to hold that unclean hands applies only to conduct before a court would be contrary to our precedent of applying the doctrine to conduct before the PTO").

[26] *Precision Instrument* at 998.

wrongdoer from enjoying the fruits of his transgression but averts an injury to the public."[27] As previously stated herein, granting Verizon's request to stay the Commission's conversion rule will harm CLECs and, in turn, will harm the public. Therefore, as a matter of equity, the Commission must reject Verizon's Petition.

CONCLUSION

Verizon's Petition is inherently defective and fails to establish any of the requirements for a stay. Additionally, Verizon comes before the Commission with "unclean hands." In light of the foregoing, Verizon's Petition should be denied.

Respectfully submitted,

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[27] *Id.*